VICTOR GLAMOUR SDN BHD A

v.

TAN KIM CHENG

COURT OF APPEAL, PUTRAJAYA B
LOW HOP BING JCA
SYED AHMAD HELMY JCA
ZAHARAH IBRAHIM JCA
[CIVIL APPEAL NO: W-02-161-2008]
29 NOVEMBER 2010 C

LAND LAW: *Caveats - Private caveats - Removal - Appellant an aggrieved party having sufficient interest over land and entitled to apply for removal of caveats - Failure of respondent to initiate action to preserve interest in land - Caveatable interest, lack of - National Land Code, s. 327* D

This was the appellant's appeal against the decision of the High Court judge ('judge') dismissing its application to remove eight caveats lodged on certain land ('said land') by the respondent. The appellant submitted that: (i) the judge erred in holding that the appellant had insufficient interest to set aside the private caveats lodged when he confirmed that the appellant was an aggrieved party; and (ii) the judge failed to consider the respondent's lack of interest in commencing any proceedings following the entry of the caveats. The appellant *vide* a written sale and purchase agreement dated 10 January 2003 had purchased the said land from the registered proprietor with the consent of the trust beneficiaries. The appellant's submission was that the caveats lodged by the respondent had prevented and prohibited the registration of the said land in the appellant's favour. The critical issue requiring determination was whether the appellant was an aggrieved party having sufficient interest over the said land, thus entitling it to apply for the removal of the caveats pursuant to s. 327 National Land Code ('NLC'). E F G H

Held (allowing the appeal with costs)
Per Syed Ahmad Helmy JCA delivering the judgment of the court:

(1) The judge had failed to exercise his discretion judiciously as there was more than ample evidence to conclude that the appellant fell within the category of "aggrieved persons" as I

envisaged by s. 327 NLC and had sufficient interest to set aside the caveats filed by the respondent. This was because the appellant's status was that of a purchaser as evident by the agreement entered into between the appellant and the registered proprietor, with the consent of the trust beneficiaries. The evidence further showed that the trust beneficiaries had instructed the registered proprietor to execute a Declaration of Trust in favour of the appellant, which the registered proprietor duly complied with. The full purchase price had also clearly been paid, and the registered owner's divestment of the proprietary rights over the said land was concretised by the duly executed Memorandum of Transfer and the original issue of document of title being handed over to the appellant. The existence of the respondent's caveats had thus invariably adversely affected the appellant's interest. *Wu Shu Chen & Anor v. Raja Zainal Abidin Raja Hussin* (refd).

(2) If the respondent had any interest over the said land as contended he would surely have preserved his interest through civil proceedings. He, however, had not initiated any action to preserve his interest and, thus, in the context of the facts herein the appellant's averment that no action was filed up to date remained unrebutted. In *Institut Teknologi Federal Sdn Bhd v. IIUM Education Sdn Bhd & Another Appeal*, the Court of Appeal held that in the absence of any rebuttal the caveat lodged must be removed. *Institut Teknologi Federal Sdn Bhd v. IIUM Education Sdn Bhd & Another Appeal* (foll).

(3) The whole scheme of the respondent's affidavit, on the facts, related to his grievance against the registered owner for breach of several agreements entered into between them, which did not tantamount to a caveatable interest to bind the said land *vis-a-vis* the appellant. The respondent's reliefs, if any, were contractual in nature against the registered owner and did not bind the appellant, who was not a party to the aforementioned agreements.

Bahasa Malaysia *Translation Of Headnotes*

Ini adalah rayuan perayu terhadap keputusan hakim Mahkamah Tinggi ('hakim') menolak permohonannya untuk membatalkan lapan kaveat yang dimasukkan atas tanah tertentu ('tanah tersebut') oleh responden. Perayu menghujahkan bahawa: (i) hakim khilaf dalam

memutuskan bahawa perayu tidak mempunyai kepentingan yang mencukupi untuk mengenepikan kaveat-kaveat persendirian yang dimasukkan apabila beliau mengesahkan bahawa perayu adalah pihak yang terkilan; dan (ii) hakim gagal menimbangkan bahawa responden tidak berminat memulakan apa-apa prosiding setelah kaveat-kaveat dimasukkan. Perayu melalui perjanjian jual beli bertulis bertarikh 10 Januari 2003 telah membeli tanah tersebut dari pemilik berdaftar dengan keizinan benefisiari-benefisiari amanah. Hujahan perayu adalah bahawa kaveat-kaveat yang dimasukkan oleh responden telah menghalang dan melarang pendaftaran tanah tersebut dalam nama perayu. Isu kritikal yang perlu ditentukan adalah sama ada perayu adalah pihak terkilan yang mempunyai kepentingan yang mencukupi atas tanah tersebut, oleh itu memberikannya hak untuk memohon bagi pembatalan kaveat-kaveat menurut s. 327 Kanun Tanah Negara ('KTN').

Diputuskan (membenarkan rayuan dengan kos)
Oleh Syed Ahmad Helmy HMR menyampaikan penghakiman mahkamah:

(1) Hakim telah gagal menggunakan budi bicaranya dengan bijak kerana terdapat keterangan yang lebih dari mencukupi untuk memutuskan bahawa perayu termasuk dalam kategori "orang terkilan" seperti yang dijangka oleh s. 327 KTN dan mempunyai kepentingan yang mencukupi untuk mengenepikan kaveat-kaveat yang difailkan oleh responden. Ini adalah kerana status perayu adalah sebagai seorang pembeli yang nyata ditunjukkan oleh perjanjian yang dimeterai oleh perayu dan pemilik berdaftar, dengan keizinan benefisiari-benefisiari amanah. Keterangan lagi membuktikan bahawa benefisiari-benefisiari amanah telah mengarahkan pemilik berdaftar untuk melaksanakan Deklarasi Amanah dalam nama perayu, yang dipatuhi sewajarnya oleh pemilik berdaftar. Harga belian telah dibayar dengan sepenuhnya, dan pelepasan hak-hak proprietari pemilik berdaftar ke atas tanah tersebut telah diwujudkan oleh Memorandum Pemindahan yang dilaksanakan dan pengeluaran asal dokumen hakmilik diserahkan kepada perayu. Kewujudan kaveat-kaveat responden telah, oleh itu, sememangnya menjejaskan kepentingan perayu. *Wu Shu Chen & Anor v. Raja Zainal Abidin Raja Hussin* (dirujuk).

A **(2)** Jika responden mempunyai apa-apa kepentingan atas tanah tersebut seperti yang dikatakan beliau semestinya akan mengekalkan kepentingannya melalui prosiding sivil. Beliau, meskipun begitu, tidak memulakan apa-apa tindakan untuk mengekalkan kepentingannya dan, oleh itu, di dalam konteks
B fakta di sini pengataan perayu bahawa tidak ada tindakan yang difailkan hingga sekarang tidak dipatahkan. Dalam *Institut Teknologi Federal Sdn Bhd v. IIUM Education Sdn Bhd & Another Appeal*, Mahkamah Rayuan telah memutuskan bahawa kaveat yang dimasukkan mesti dibatalkan kalau tiada pematahan.
C *Institut Teknologi Federal Sdn Bhd v. IIUM Education Sdn Bhd & Another Appeal* (diikuti).

(3) Skema keseluruhan afidavit responden, berdasarkan fakta, berkenaan dengan kilanannya terhadap pemilik berdaftar bagi
D pelanggaran beberapa perjanjian yang dimeterai di antara mereka, yang tidak berjumlah kepada suatu kepentingan yang boleh dikaveat untuk mengikat tanah tersebut berhubungan dengan perayu. Relief-relief responden, jika ada, adalah bersifat kontraktual terhadap pemilik berdaftar dan tidak mengikat
E perayu, yang bukan merupakan pihak kepada perjanjian-perjanjian tersebut.

Case(s) referred to:
Eng Mee Yong & Ors v. Letchumanan [1979] 1 LNS 18 PC ***(refd)***
Institut Teknologi Federal Sdn Bhd v. IIUM Education Sdn Bhd & Another
F *Appeal [2008] 1 CLJ 745 CA* ***(foll)***
Luggage Distributors (M) Sdn Bhd v. Tan Hor Teng & Anor [1995] 3 CLJ 520 CA ***(refd)***
Punca Klasik Sdn Bhd v. Abdul Aziz Abdul Hamid & Ors [1994] 1 CLJ 403 HC ***(refd)***
G *Wu Shu Chen & Anor v. Raja Zainal Abidin Raja Hussin [1997] 3 CLJ 854 CA* ***(refd)***

Legislation referred to:
National Land Code, ss. 326, 327(1)

H *For the appellant - Lim Yew Hock; M/s Yew Hock & Loh*
For the respondent - Atma Singh Veriah (Devahi Rosalind John with him); M/s Atma Singh Veriah & Co

Reported by Suresh Nathan

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JUDGMENT

Syed Ahmad Helmy JCA:

[1] The appellant's appeal herein is against the decision of the learned High Court Judge given on 8 January 2008 dismissing the appellant's application in encl. 1 to set aside/remove the eight (8) caveats lodged on the land held under Geran 50086, Lot 51630 Mukim and Daerah Kuala Lumpur (hereinafter called the "said land").

[2] The appellant in challenging the learned judge's grounds of decision submits that the learned judge fell into error in holding in his written grounds that the appellant had no sufficient interest to set aside the private caveats lodged when in pronouncing his decision on 18 January 2008 he confirmed that the appellant was an aggrieved party; that the learned judge failed to consider and take into account the respondent's lack of interest in commencing any proceedings following the entry of the caveats.

[3] Upon scrutinising the memorandum of appeal and the grounds of appeal we are of the view that the critical issue for determination is whether the appellant is an aggrieved party having sufficient interest over the said land to entitle the appellant to apply for the removal of the caveats on the said land pursuant to s. 327 of the National Land Code (NLC).

[4] In determining the critical issue aforesaid it is only appropriate to set out briefly the salient background facts.

[5] The said land is registered in the name of one Magasu Sundram a/l T. Magasu who is also the beneficial owner of 1/2 undivided share in the said land and holds the other 1/2 share as trustee for M. Sivapathy a/l Magasu.

[6] On 10 January 2003 *vide* a written sale & purchase agreement the appellant purchased the said land from the registered proprietor Magasu Sundram a/l T. Magasu with the consent of the trust beneficiaries Magasu Sundram a/l T. Magasu and M. Sivapathy a/l Magasu.

[7] The appellant in their supporting affidavit affirmed by their Director Ho Swee Ming on 25 May 2007 averred that the full purchase price had been paid on 5 April 2005 whereupon the original grant and the duly executed Memorandum of Transfer in Form 14A of the said Land was handed by the registered proprietor to his solicitors Messrs. Yew Hock and Loh. In support of the averment aforesaid the letter dated 5 April 2005 and the duly executed Memorandum of Transfer was tendered as exh. "HSM2".

[8] In further support of their interest over the said Land the appellant averred that on 13 April 2005 on instruction from the beneficiaries the registered proprietor executed a Deed of Trust in favour of the appellant which Deed of Trust was exhibited as "HSM3".

[9] By reason thereof the appellant avers that the caveats lodged by the respondent has prevented and prohibited the registration of the said land in their favour.

[10] The respondent in disputing the appellant's claim avers in his affidavit in reply affirmed on 14 June 2007 that the lodgement of the caveats was made with the express consent of the registered proprietor and that the appellant was fully aware of the respondent's various rights over the said land as specifically set out in the caveats and also in the recitals in the sale & purchase agreement of 10 January 2003.

[11] Reverting to the application herein since it is made pursuant to s. 327 National Land Code (NLC) the wording thereof does not confine it to the caveatee (ie, registered owner) but to any other person aggrieved by the existence of caveat. Unlike s. 326 which is available only to the caveatee the procedure under s. 327 covers a wider category of persons and the approach to be adopted varies as was lucidly laid down by the Privy Council in *Eng Mee Yong & Ors v. Letchumanan* [1979] 1 LNS 18; [1979] 2 MLJ 212 where Lord Diplock at p. 212 stated:

> Whereas the procedure under section 326 for obtaining the removal of a caveat is available only to the caveatee, *the procedure for applying directly to the court for an order of removal is available not only to the caveatee but also to any other person aggrieved by the existence of the caveat* – typically a purchaser to whom the

registered proprietor has contracted to sell the land but the sale has not yet been completed by a proper instrument of transfer duly registered. In their Lordships' view a distinction must be drawn between cases where the applicant is the registered proprietor of the land (ie, the caveatee) and cases where the applicant is some other person who claims a right to an interest in it. In the former case the caveatee can rely upon his registered title as *prima facie* evidence of his unfettered right to deal with the land as he pleases; it is for the caveator to satisfy the court that there are sufficient grounds in fact and law for continuing in force a caveat which prevents him from doing so. So where, as in the instant case, the only parties to an application under section 327 are caveatee and caveator there is no difference between what the caveator must establish to obtain an extension of the caveat under section 326 and what he must establish to defeat the caveatee's application for removal of the caveat under section 327.

It is otherwise *when the applicant under section 327 is someone other than the caveatee. He has no registered title to rely upon as prima facie evidence of his interest in the land. It is for him to begin by satisfying the court that there are sufficient grounds in fact and law for treating him as a person claiming such an interest in the land as would,* if it were established, make him aggrieved by the existence of the caveat.

[12] It is thus incumbent for an applicant under s. 327 NLC to satisfy the court that there are sufficient grounds in fact and in law for treating him as a person claiming such an interest in the land as would, if it were established, make him aggrieved by the existence of the caveat.

Only upon the applicant under s. 327 NLC satisfying the court that there are sufficient grounds in fact and law for treating him as an aggrieved party would an inquiry on whether the caveat of the respondent should be removed be proceeded upon.

[13] The Court of Appeal in *Luggage Distributors (M) Sdn. Bhd. v. Tan Hor Teng* [1995] 1 MLJ 719 laid down the procedure to be adopted at p. 723 thereof:

In considering an application for the removal of a caveat, the procedure to be adopted should be a simple and summary one. At the first stage, the court will examine the grounds expressed in the application for the caveat to see whether they show a caveatable interest. Once the court is satisfied that the caveator's claim amounts in law to a caveatable interest, it must then go on

A to consider whether the claim discloses a serious question meriting a trial. After these two stages have been crossed, the court must decide where the balance of convenience lies.

[14] The question arises whether the applicant/appellant herein has adduced sufficient evidence to satisfy the court that it falls within the category of aggrieved persons entitling it to remove the caveats lodged.

[15] Turning to the appeal record herein it is noted from the grounds of judgment that the learned judge dismissed the appellant's application on the ground that "the applicant failed to establish he had sufficient interest on the land to found a basis to seek to set aside the caveats filed thereon so as to be registered on the title as owner," even though he had in pronouncing the judgment on 8 January 2008 held that the appellant was an aggrieved party. The reasoning of the learned judge was based on his interpretation that there are two limbs to s. 327(1) NLC namely aside from ascertaining that the appellant is an aggrieved party the Court has also to consider whether it is just to grant the order.

[16] Though we are not oblivious that a s. 327 NLC application involves an exercise of discretion by the trial judge nevertheless such discretion must be exercised judiciously and appellate interference is warranted if the exercise of discretion was based on erroneous principles not supported by the evidence adduced.

[17] Whether the learned judge was justified in his finding that the appellant had insufficient interest over the land and had exercised his discretion judiciously in not granting the appellant the relief sought would invariably entail an assessment of the evidence adduced.

[18] Upon a scrutiny of the evidence presented we are of the view that the learned judge failed to exercise his discretion judiciously as there is more than ample evidence to conclude that the appellant herein falls within the category of "aggrieved persons" as envisaged by s. 327 NLC and had sufficient interest to set aside the caveats filed by the respondent.

[19] In *Wu Shu Chen & Anor v. Raja Zainal Abidin bin Raja Hussin* [1997] 3 CLJ 854 it was held that though the National Land Code contains no definition of an aggrieved person nevertheless the word "aggrieved" must be given its ordinary meaning. To be aggrieved means one is dissatisfied with or adversely affected by a wrongful act of someone. An aggrieved person is therefore a person whose legal right or interest is adversely affected by the wrongful act or conduct of another person or body. The category of aggrieved persons is never closed.

[20] We say so because the appellant's status is that of a purchaser as evident by the Sale & Purchase Agreement dated 10 January 2003 entered into between the appellant's as purchaser and Magasu Sundram a/l T. Magasu as registered proprietor as vendor. The Sale and Purchase Agreement which appears at pp. 549 to 588 of the appeal record is entered into with the consent of the trust beneficiaries.

[21] The evidence further shows that the trust beneficiaries Magasu Sundram a/l T. Magasu and M. Sivapathy a/l Magasu consented to the sale when they instructed the registered proprietor Magasu Sundram *vide* letter dated 5 April 2005 to execute a Declaration of Trust in favour of the appellant which was duly complied with by the registered proprietor *vide* Declaration of Trust dated 13 April 2005 – see pp. 603 and 599 to 603 of the appeal record respectively.

[22] As regards the payment of the full purchase price we are satisfied that there is ample evidence that it had been paid as evident by the acknowledgment and confirmation of receipt of the full purchase price in the letter of 5 April 2005 by the solicitors Messrs. Yew Hock & Loh (see pp. 590 of appeal record). It must be stressed that the particulars of the cheques and the amount thereof were expressly stated in the letter aforesaid.

[23] The divestment of the proprietary rights over the said land by the registered owner is concretised by the duly executed Memorandum of Transfer and the original issue of document of title being handed over and surrendered to the appellant – see pp. 591-593 and 594-597 respectively.

A **[24]** The existence of the respondent's caveats had invariably adversely affected the appellant's interest herein.

[25] The respondent's challenge that the appellant being aware of the several caveats lodged by the respondent when it purchased
B the said land as reflected in the Sale & Purchase Agreement had notice of the respondent's rights over the land and cannot now complain and/or dispute the respondent's interest over the said land is untenable to say the least.

C **[26]** In our view the challenge aforesaid cannot be sustained and is without merits for the reason that the respondent if at all he has an interest over the said land as averred would surely prosecute/preserve his interest through civil proceedings but up to date has not initiated any action to preserve his interest. Surely
D had he such an interest the respondent would have initiated legal proceedings to compel the registered proprietor to sell the property to him or prevent the registered proprietor from selling the said land to the appellant. In the context of the facts herein the averment that no action was filed/initiated up to date remains
E unrebutted. In *Institut Teknologi Federal Sdn. Bhd. v. IIUM Education Sdn. Bhd. & Another Appeal* [2008] 1 CLJ 745 the Court of Appeal held that in the absence of any rebuttal the caveat lodged must be removed. The fact that they have not done so shows the hollowness of their purported "interest" and is the
F death knell of their case.

[27] It is also pertinent for us to emphasise that knowledge of an existing caveat does not and cannot prevent a purchaser from being an aggrieved person or body of persons – see *Punca Klasik Sdn. Bhd v. Abdul Aziz bin Abdul Hamid & Ors* [1994] 1 CLJ 403.

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[28] The whole scheme of the respondent's affidavit relates to his grievance against the registered owner for breach of the several agreements dated 27 June 1990, 17 October 1990 and 7 January 1992 entered into between them and in our view does not
H tantamount to a caveatable interest to bind the said land *vis-a-vis* the appellant herein. The respondent's reliefs (if any) is contractual in nature against the registered owner and does not bind the appellant who is not a party to the several agreements entered into by the respondent with the registered owner.

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[29] For the reasons aforesaid we allow the appeal with costs. The order of the High Court is set aside. Order in terms of the application in encl. 1 with costs of RM5,000. The deposit is to be refunded to appellant.

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